Fundamentals of Environmental Law

Guarding America — Defending Freedom

Roseann Sendek

Chief, Environmental Law/Real Estate Counsel

NGB-JA

DSN: 327-2741

Email: roseann.sendek@ngb.ang.af.mill

Overview

- **Summary of major federal environmental laws**
- **To give you a familiarity of law and regulatory drivers**
- **Summary**
- **Key References**

Purpose

- **Have basic familiarity with federal environmental laws**
- **Know where to find the law, regulations, and AF/ANG policy**
- **POCs – who can help**
- **What to do if you receive an NOV?**

Where to Find the Law

- 1. Federal law & regulations: (United States Code, Federal Register, Code of Federal Regulations):
- http://www.gpoaccess.gov/multidb.html
- 2. Office of Management and Budget circulars: www.whitehouse.gov/omb/circulars
- 3. Recently executed Executive Orders (also searchable via the Federal Register Database):
- http://www.whitehouse.gov/news/orders/
- 4. State laws and regulations can be found at each state's website - ww.statename.gov
- 5. Department of Defense Publications including DoD Directives and Instructions: www.dtic.mil/whs/directives
- 6. Air Force and ANG Regulations and Pamphlets available on the Air Force portal (a secure site)
- 7. National Guard Regulations and Pamphlets: www.ngbpdc.ngb.army.mil
- www.fedcenter.gov/programs/compliance/#regs

Where to find the law!

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- 3. Recently executed Executive Orders (also searchable via the Federal Register Database):
- http://www.whitehouse.gov/news/orders/
- 4. More general information about the Federal Government than you can shake a stick at is at
- http://www.archives.gov/federal-register/publications/index.html
- www.fedcenter.gov/programs/compliance/#regs
- 5. Department of Defense Publications including DoD Directives and Instructions: www.dtic.mil/whs/directives
- 6. Air Force and ANG Regulations and Pamphlets:
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Funding Environmental Activities

- Central funding provided by feds
- States have environmental staffs
- Readiness centers provide funding, training, assistance
- Ems contact their Readiness Center POC for help and they will contact NGB-JA

Paying Fines

- **BUT….**

- **Fines are still subject to Air Force and Army policy that says that fines are to be paid out of an operations and maintenance (O+M) account of the unit other than that unit's environmental O+M account or an environmental account of that unit's higher headquarters.**

Potential Liability

- **Tort - monetary damages**
  - **Civil - fines & penalties**
  - **Criminal - fines & penalties/jail**
- **Intentional - no immunity**
- **Negligence - absolute immunity if conduct within scope of employment**
  - Govt - liable for negligent and wrongful acts or omissions

Civil Liability

- **Bad news – unless statutorily exempted, Guard personnel are not immune from civil liability**
- **Good news – most federal environmental statutes (e.G., CAA, CWA, RCRA and SDWA <u>exempt</u> federal employees from liability for civil fines and penalties**
- **Bad news – most Guard personnel are state employees**

Criminal Liability Law School Review

- **Specific intent -** intent to commit <u>crime</u>
- **General intent -** intent to commit <u>act</u>
- **Negligence -** failure to exercise required degree of care

Most env. crimes are <u>general intent</u>

Act must be done “knowingly” - “done voluntarily and intentionally and not because of ignorance, accident or other innocent reason.”

In Other Words…

- The Government need only prove the defendant knowingly committed the act, not that the defendant knowingly violated the law

The "Responsible Corporate Officer" Doctrine

- **One who operates within the regulated community (<u>commander!</u>) Is presumed to know that articles or substances capable of threatening public health & safety are subject to regulation and handled with a greater degree of care**

- **Officials have a duty to know about violations within their dominion and control**

Lack of knowledge is no defense

NEPA

- **Procedural, not substantive: not important what your analysis reveals as long as it is disclosed to the public. (Public involvement key aspect of nepa)**
- **Categorical exclusion (Army- CX, Air Force - CATEX) w/record of env consideration (REC)**
- **Environmental Assessment (EA)**
- **Environmental Impact Statement (EIS)**

RCRA

- “Cradle to grave” coverage
- Determine whether solid waste is a hazardous waste
- Send waste to appropriate satellite accumulation point (SAP) per waste stream
- From SAP to accumulation point
- Then deliver (manifest) to transport, storage & disposal (TSD) facility
- TSD performs “magic”

What's a Solid Waste?

- **Gas, liquid, semi-solid, or a solid that has been abandoned or recycled**
- **Abandoned = garbage/no longer useable**
- **"Recycled" means:**
  Applied to land in manner constituting disposal
  Burned for energy recovery
  Processing to recover usable product
  Accumulate speculatively

What's a Hazardous Waste?

- **"Used for intended purpose and chemical nature is a threat"**
- **"Listed" waste v."Characteristic" waste**

Ignitability = flash point < 140 degrees

Corrosivity = ph 2 or less or 12.5 or greater

Toxicity determined using toxic characteristic leaching procedure (tclp)

CERCLA Liability

Generally, one incurs liability if

- **A release or threatened release of a hazardous substance has occurred;**
- **The government or other authorized response party incurred response costs due to the release; and**
- **The party falls within one of the four classes of "Potentially Responsible Parties" (PRPs) in CERCLA Section 107**

“Potentially Responsible Parties” (PRPs) under CERCLA Section 107

- Present or former owner of site
- Operated site at time of disposal
- “arranged” for disposal/treatment
- Transporter

Most Common Contaminant Classes (for DoD) under CERCLA

- **Explosives found in**
  - **Ground water**
  - **Soil (burning grounds, demolition areas)**
  - **sediment (lagoons, ditches)**
- **Chlorinated solvents & petroleum hydrocarbons found in ground water and soil**

“Arranger Liability”

- **One is liable under CERCLA if he “arranged for” disposal by sending waste to a facility containing hazardous substances similar to those sent by the generator (i.e., landfill)**

and

- **A release or threatened release of that substance occurs that results in incurring response costs**

“Classic Case” of ARNG/ANG CERCLA Liability

- **Air or Army Guard facility contracts for disposal of waste**
- **Release occurs at the waste site**
- **Facility’s records show disposal**
- **Contractor’s records show it picked up similar wastes at the facility and disposed of them at the waste site**

CERCLA Standard of Liability

- **Strict**
- **Joint and several**
- **Difficult to prove divisibility of harm**
- **Divisibility of harm is defendant's burden**

RCRA Corrective Action

- Purpose: Congress passed in 1984 to give regulatory bodies more “bite”

- Applies only to TSDs
- **Closure permits tricky: installation may not have known it was a TSD**

  Installation must clean all “releases” on base before a permit will be given

  Cercla was supposed to handle “releases”

CERCLA v. RCRA?

- **Sovereign immunity**
  - **RCRA - broadest possible waiver**
  - **CERCLA - most limited waiver**

- **Who controls**
  - **RCRA - state regulators**
  - **CERCLA - DoD for property owned, leased, or otherwise possessed by DOD**

  - **Installation restoration program (IRP) 100% federal**

Clean Water Act

- **“It is unlawful for any person to discharge pollutants into the waters of the united states without a permit.” 33 USC Section 1311(a).**
- **Discharge of a pollutant**
- **Navigable waters - “waters of the U.S.”**

CWA Pollution Control Mechanisms

- **NPDES Permits (33 USC Section 1342)**
- **Permit authorities - EPA, delegated states**
- **Permits are issued for five year periods**
- **Guard entities who are facility owners must apply for permits, unless the facility is operated by someone other than the owner, in which case it is the operator's duty to obtain a NPDES permit under the CWA (contrast AF policy that host obtains permits)**

More CWA Pollution Control Mechanisms

- **Pretreatment program - 33 USC Section 1317**
- **Pretreatment standards are written into the NPDES permit of the POTWs**
- **Apply to particular industries, some of which occur on guard properties**

Safe Drinking Water Act (SDWA)

- **42 USC 300f, 40 CFR 141**
- **Regulates public and federal water systems that regularly provide drinking water to more than 25 people for 60 more days/year or which have 15 or more service connections**
- **Applies to guard facilities with covered drinking water treatment systems**

Spill Prevention, Notification, & Response

- **CWA Section 311 (33 US Code Section 1321) prohibits discharge of oil or hazardous substances into or upon navigable waters of the US.**
- **Spill prevention control countermeasure plans (SPCCs): each facility should have an up-to-date installation spill control plan (ISCP)**
- **Failure to report spills can result in civil and criminal penalties**

Clean Air Act

- **Four key CAA terms:**
  - **“State implementation plan”**
  - **“Criteria pollutants”**
  - **“Nonattainment area”**
  - **“air emissions inventory”**

NG Air Emission Sources

- **Stationary sources:**
- **(Boilers, smokestacks - think permits)**

- **Mobile sources:**
- **(Motor vehicles - think engine standards, vehicle inspection & maintenance)**

Air Conformity and the Guard

- **Only applies in nonattainment areas**
- **A component of NEPA analysis: must show how the proposed action "conforms to" the SIP**
- **"Conformity evaluation" is included in the NEPA document (EA/EIS)**

CAA Title V Permit

- **A “major source permit”**
- **Based on <u>potential</u> to emit air pollutants**
- **A comprehensive permit for stationary sources**

Endangered Species Act

- **“All federal agencies shall, in coordination with and the assistance of the Secretary [of US Fish & Wildlife Service] utilize their authorities to further the purposes of the act by carrying out their programs for the conservation of endangered and threatened species”**

- **(ESA, SEC. 7(a)(1)**

Duty Under ESA

- **“All federal agencies shall, in consultation with the Secretary, ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat.”**

- **(ESA, SECTION 7(a)(2)**

Meeting ESA Requirements

- **Accomplished via Integrated Natural Resource Management Plans (INRMPs)**
- **Considered as part of NEPA analysis for federally funded projects**
- **Consult with Fish and Wildlife Service**
- **Contact NGB-JA with specific questions**

Cultural Resources Laws

- **Goal: balance mission requirements with cultural resources compliance**
- **Failure to consider cultural resource statutes can halt or cause delays in training**

National Historic Preservation Act

- **“The head of any federal agency having direct or indirect jurisdiction over a proposed federal or *federally-assisted undertaking* in any state … shall, *prior to the approval of the expenditure of any federal funds* on the undertaking …, *take into account* the effect of the undertaking on any … site, building, structure or object that is included in or eligible for inclusion on the national register. The head of any such federal agency shall afford the ACHP a *reasonable opportunity to comment.*”**

NHPA Section 106 Consultation

- Undertaking (federal financial assistance or direction)
- Area of potential effect (may be larger than project area due to visual, audible effects)
- Identification - SHPO input begins
- National Register of Historic Places
- Determine effects (no effect, no adverse effect, adverse effect)
- Consult
- Consultation vehicle = ICRMP